IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
21ST JUDICIAL CIRCUIT, STATE OF MISSOURI
ASSOCIATE JUDGE DIVISION

DEBT COLLECTOR,	)	
	)	
Plaintifff,	)	
	)	Cause No. 0XAC-11110111 I CV
v.	)	
	)	Division: 75
JOE CONSUMER,	)	
	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS

Plaintiff has brought a motion to dismiss defendant's counterclaims in this matter, directing it's arguments against defendant's Answer and Counterclaims. Plaintiff's Motion to Dismiss should be denied on all bases because defendant has properly pleaded causes of action for violations of Section 408 and the FDCPA.

BACKGROUND FACTS

This suit is litigated against a background of multiple litigations involving the same plaintiff against numerous different, but similar defendants. Many courts have addressed the arguments made by plaintiff before and denied them, and this Court should likewise reject the arguments made by plaintiff and deny its motion to dismiss.

ARGUMENT

Legal Standard

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to the plaintiff all reasonable inferences therefrom. No attempt is

made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. 2001).

Defendant's Counterclaims Are Not Barred By Any Immunity Doctrines Because In Missouri, Witness Immunity Only Applies In Defamation Cases; Moreover, Plaintiff Is A "Complaining Witness" Who May Not Hide Behind The Immunity Shield When Pursuing A Questionable Collection Action

The Missouri Supreme Court provided the following analysis of the witness immunity doctrine in *Murphy v. A. A. Mathews, Div. of CRS Group Engineers, Inc*., 841 S.W.2d 671, 674 (Mo. 1992). Namely, the Court held:

> Witness immunity is an exception to the general rules of liability. It should not be extended unless its underlying policies require it be so. In Missouri, this ***immunity generally has been restricted to defamation, defamation-type, or retaliatory cases against adverse witnesses***. This narrow restriction is consistent with the historical development of immunity. *Murphy*, 841 S.W.2d at 680.

In finding that witness immunity did not apply to facts of *Murphy*, the Court held:

> While the rationale for witness immunity clearly supports application of the immunity to witnesses of unique fact or opinion ***who are otherwise unrelated to the litigation***, it does not necessarily contemplate the situation of a professional who voluntarily agrees to assist a party in the litigation process for compensation.

Thus, not only is the doctrine of witness immunity restricted to defamation cases, the doctrine likewise is primarily restricted to non-parties, unlike the instant case where *Plaintiff* itself is seeking immunity for filing a false affidavit.

In *Todd v. Weltman, Weinberg & Reis Co*., 434 F.3d 432 (6th Cir. 2006), the defendant had filed a false affidavit in a state court action, which prompted the plaintiff to file a claim in federal court based on the defendant's violation of the Fair Debt Collection

Practices Act ("FDCPA"). The defendant claimed it was immune from suit based on the witness immunity doctrine. The Sixth Circuit Court of Appeals disagreed and affirmed the lower court's decision to deny the defendant's motion to dismiss. In so holding, the court provided the following analysis as to when witness immunity will and will not apply:

> (1) A private witness testifying at trial is absolutely immune for her testimony;
>
> (2) A private witness testifying at a grand jury is absolutely immune for her testimony;
>
> (3) A private witness ***testifying as a complaining witness*** has no immunity for her testimony. *Todd*, 434 F.3d at 444.

Here, there is no dispute that Plaintiff filed its petition as a party in this lawsuit, and has sought to obtain affirmative relief from Defendant based on that petition. Defendant is thus a "complaining witness" and has no right to seek immunity under the "witness immunity" doctrine.

Defendant anticipates that Plaintiff will attempt to distinguish *Todd* based on the fact that the false affidavit in *Todd* was used to support a non-wage garnishment proceeding unlike here, where Plaintiff has used an unsubstantiated "statement" to support its petition. Plaintiff, rather, relies on two federal district court cases, *Etapa v. Asset Acceptance Corp*. 373 F.Supp. 2d 687 (E.D. Ky 2004) and *Beck v. Codilis & Stawiarski*, P.A., 2000 LEXIS 22440 (N.D. Fla. 2000) to support its argument that witness immunity bars Defendant's counterclaim in the instant action. However, the *Todd* Court specifically addressed the *Etapa* and *Beck* decisions and found them to be "unpersuasive." *Todd*, 434 F.3d at 444. Moreover, Plaintiff will not be unable to cite

any decisions beyond the district court level in support of its position, while *Todd*, a Sixth Circuit Court of Appeals case, squarely sides with Defendant.

Likewise, the "judicial immunity doctrine" and "First Amendment Right to Petition doctrine" do not present a bar to Defendant's counterclaims. In *Kelly v. Great Seneca Fin. Corp*., 2005 U.S. Dist. LEXIS 40192, 12-13 (D. Ohio 2005), the court specifically rejected this argument and held: "But whether the historical antecedents for common law immunity emanate from First Amendment concerns, or from the underpinnings of the Anglo-American privilege for judicial proceedings, the defendants' immunity arguments cannot overcome the unambiguous text of the statute and the unambiguous holding of *Heintz v. Jenkins*, which this Court must follow". See also, *DIRECTV, Inc. v. Cephas*, 294 F. Supp. 2d 760, 767 (D.N.C. 2003), where the court expressly found the doctrine of "right to petition" did not apply to a defendant's counterclaims which did not have a chilling effect on subsequent good faith litigation by the plaintiff.

Additionally, the court in *White v. Camden County Sheriff's Dep't*, 106 S.W.3d 626, 633 (Mo. App. S.D. 2003) held that "[c]onduct which is 'intimately associated with the judicial phase' of the judicial process is protected by absolute judicial immunity. ***It is the judicial function that requires protection***. *Id*. at 633 (emphasis added). The court then gave the following example of when the immunity applies: "Judicial immunity protects a sheriff who is following a protected judge's orders." In the instant case, Plaintiff was never attempting to carry out the "judicial process;" rather Plaintiff was merely attempting to "use" the judicial process to secure a judgment against Defendant. Plaintiff's reliance on the "absolute judicial immunity" doctrine is therefore meritless.

Even Assuming Defendant's Counterclaims Would Otherwise Be Barred By Witness Immunity, The Fair Debt Collection Practices Act Preempts Missouri Law And Prohibits Such A Result

According to 15 U.S.C. § 1692n of the Fair Debt Collection Practices Act ("FDCPA"), even if Plaintiff did enjoy some form of immunity under Missouri state law (which Defendant vehemently denies), Plaintiff would be pre-empted from asserting immunity with respect to Defendant's FDCPA claims. Section 1692n states as follows:

> The subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, ***except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency***. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter. (Emphasis added).

Thus, to the extent that the laws regarding witness immunity in Missouri are inconsistent with Defendant's right to assert an FDCPA claim, the inconsistency must be resolved in favor of Defendant. It is the express intention of Congress that Plaintiff may not defeat Defendant's FDCPA claim by asserting "immunity" under State law. The counterclaims necessarily must survive as a result.

Plaintiff's Motion To Dismiss Count I Of Defendant's Counterclaim Should Be Denied Because, According To The Plain Language Of The Statute, § 408.556 Applies To "ALL" Credit Transactions, Which Necessarily Includes Unsecured As Well As Secured Credit Transactions

Plaintiff moves to dismiss Count I of Defendant's counterclaim on the basis that § 408.556 RSMo "is not applicable to credit transactions where the creditor is not seeking a deficiency judgment or the disposition of collateral." Section 408.556.1 states as follows:

> **408.556. Actions arising from default, contents of petition – default judgment requires sworn testimony – recovery of unpaid balances** – 1. In **any** action brought

> by a lender against a borrow arising from default, the petition shall allege the facts of the borrower's default, facts sufficient to show compliance with the provisions of sections 400.9-601 to 400.9-629, RSMo, which provisions are hereby deemed applicable to all credit transactions, with respect to any sale or other disposition of collateral for the credit transaction, the amount to which the lender is entitled, and an indication of how that amount was determined.

Thus, based on the plain language of the statute, § 408.556 applies to "any action brought by a lender against a borrower," and nowhere does the statute distinguish between "secured" and "unsecured" transactions.

When interpreting a statute, the courts are to determine the intent of the legislature, giving the language used its plain and ordinary meaning, and giving effect to the intent, if possible. *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997); *Cline v. Teasdale*, 142 S.W.3d 215, 222 (Mo. App. 2004). If the intent of the legislature is clear and unambiguous, then the courts are bound by that intent and cannot resort to any statutory construction in interpreting the statute. *Preston v. State*, 33 S.W. 3d 574, 579 (Mo. App. 2000); *Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). "When the legislative intent cannot be ascertained from the language of the statute, by giving its plain and ordinary meaning, the statute is considered ambiguous and only then can the rules of statutory construction be applied. *Bosworth v. Sewell*, 918 S.W.2d 773, 777 (Mo. banc 1996).

The clear intent of Section 408.556.1 is to protect consumers from "lawsuit abuse" by requiring creditors to satisfy minimum pleading requirements when filing collection actions against consumer debtors. Namely § 408.556.1 sets forth four separate,

clear and unambiguous criteria that creditors must plead when filing collection actions; namely, the petition MUST allege:

(1) the facts of the borrower's default;
(2) facts sufficient to show compliance with the provisions of sections 400.9-601 to 400.9-629 RSMo, which provisions are hereby deemed applicable to all credit transactions, with respect to any sale or other disposition of collateral for the credit transaction;
(3) the amount to which the lender is entitled; and
(4) an indication of how that amount was determined.

With respect to the first criterion, it is clear the legislature did not want creditors to be able to stand on bald legal assertions in their collection actions; rather, creditors have to allege "facts" sufficient to apprise the consumer of the validity of the claim. Thus, the first criterion of § 408.556.1 requires more than the *informal pleadings* permitted by § 517.031 RSMo (Procedures Before Certain Associate Circuit Judges). Rather, it requires a thorough factual statement of the consumer's default. Since Defendant's counterclaim alleges that Plaintiff failed to meet this pleading requirement, the counterclaim thus states a claim upon which relief can be granted.

With respect to the second criterion, creditors (when applicable) have the additional burden of alleging facts to show compliance with UCC Article 9 (Secured Transactions), which contains stringent notice requirements prior to the repossession and subsequent disposition of collateral. Plaintiff apparently argues that because this section of the statute does not apply to unsecured creditors (or even to secured creditors who are NOT seeking a deficiency judgment or the disposition of collateral), then NONE of the statute applies to these creditors. In other words, Plaintiff appears to argue that the language "*with respect to any sale or other disposition of collateral for the credit transaction*" is ambiguous because the language could apply to the entire statute (in

which case the application of the statute would be severely restricted) or it could apply to the second criterion alone (i.e., where a creditor must comply with sections 400.9-601 to 400.9-629 RSMo). Defendant will fully address this argument shortly.

With respect to the third and fourth criteria, Plaintiff must not only allege the amount of money it is seeking, it must also state the manner in which it determined that amount. Defendant is not aware of any Missouri case which specifically sets forth the manner in which a creditor can meet this burden. However, it would be difficult to imagine that a creditor could satisfy this burden without having a complete history of the consumer's account information in front of it at the time it prepared the petition.

Since Plaintiff argues in its motion to dismiss that § 408.556 ***in its entirety*** only applies to instances where a creditor is seeking a "deficiency judgment or the disposition of collateral," Plaintiff is necessarily arguing the statute is "ambiguous," given the fact that the statute itself does not make this statement and otherwise clearly and unambiguously states that it applies to "*any action brought by a lender against a borrower arising from default*." According to Plaintiff's argument, the statute does not really apply to "*any action*," but only to actions "*for a deficiency judgment or a disposition of collateral*." In other words, Plaintiff would have the Court re-write the statute from its current version which begins:

> "*In any action brought by a lender against a borrower arising from default . . .*"

to Plaintiff's preferred version which would begin:

> "*In any action for a deficiency judgment or a disposition of collateral brought by a lender against a borrower arising from default . . .*"

Since the existing statutory language clearly sets forth the intention of the legislature, it is not necessary for the Court to construe the statute. The Court should thus have no trouble agreeing the legislature meant "any action" when it wrote "any action" into the statute.

However, even if the Court does find the statute is ambiguous, the Court should nevertheless resolve the ambiguity in favor of Defendant. Once again, the language of § 408.556.1 reads as follows:

> In any action brought by a lender against a borrower arising from default, the petition shall allege the facts of the borrower's default, facts sufficient to show compliance with the provisions of sections 400.9-601 to 400.9-629 RSMo, which provisions are hereby deemed applicable to all credit transactions, *with respect to any sale or other disposition of collateral for the credit transaction*, the amount to which the lender is entitled, and an indication of how that amount was determined.

The *ambiguity* which the Court must resolve is whether the phrase "*with respect to any sale or other disposition of collateral for the credit transaction*" only applies back to the language "facts sufficient to show compliance with the provisions of sections 400.9-601 to 400.9-629 RSMo," or whether it also applies back to the phrase "the petition shall allege the facts of the borrower's default," **and also applies ahead** to the phrases "the amount to which the lender is entitled," and "an indication of how that amount was determined." Once again, Defendant reminds the Court that "without ambiguity, statutory construction is unacceptable." *City of Wellston v. SBC Communs., Inc.*, 203 S.W.3d 189, 193 (Mo. 2006). However, even *with* statutory construction, Defendant's argument still prevails.

It is undisputed that Chapter 408 is a remedial statute. In Missouri, remedial statutes must be liberally construed so as to give the greatest application possible to the

class of persons they intend to protect. See, *Hagan v. Director of Revenue*, 968 S.W.2d 704, 706 (Mo. 1998) ("[f]urthermore, remedial statutes are to be interpreted 'in order to accomplish the greatest public good");" *City of Independence v. Kerr Constr. Paving Co*., 957 S.W.2d 315, 321 (Mo.App.W.D. 1997) ("[s]tatutes that are remedial in purpose should be liberally construed to effectuate the remedial purposes"); *Scheble v. Missouri Clean Water Com.*, 734 S.W.2d 541, 556 (Mo.App.E.D. 1987) ("Remedial Legislation, such as the Clean Water Law, should be broadly and liberally construed to effect its plain purpose."); and *Kartheiser v. American Nat'l Can Co*., 271 F.3d 1135 (8th Cir. 2001) ("The law is remedial in nature and is meant to be liberally construed").

Without question, Plaintiff's interpretation of § 408.556.1 would result in an extremely limited application of the statute (i.e., to instances where a creditor is seeking a deficiency judgment or a disposition of collateral), while Defendant's interpretation would give the broadest possible application to § 408.556.1 (i.e., to *all* credit transactions where a creditor is suing a consumer based on a default). Plaintiff's interpretation is the antithesis of the liberal application required by the well established body of Missouri case law and should be rejected by this court.

Furthermore, the overall statutory scheme of § 408.551 *et seq*. is consistent with Defendant's interpretation that the statute applies to ALL (i.e., secured AND unsecured) credit transactions. Section 408.551 (the "preamble" to the section on "Defaults") specifically states: "Sections 408.551 to 408.562 (of which § 408.556 is a part) ***shall apply to ANY credit transaction*** made primarily for personal, family or household purposes **. . .**" (Emphasis added). Thus, the coverage restriction does not delineate according to "secured" or "unsecured" transactions, but rather according to whether the

transaction is for "personal, family or household" (i.e. consumer) purposes as opposed to business purposes. Therefore, as long as the underlying credit transaction involved a "consumer" purchase rather than a "business" purchase, the provision on "Defaults" will apply to *any* creditor who attempts to use the Missouri courts to collect money from that consumer.

Defendant's interpretation that § 408.551 *et seq*. applies to both "secured" and "unsecured" credit transactions is further supported by the various definitions given to key terms used throughout the statute. For instance, § 408.551 specifically states that "credit transactions" and "retail time transactions" have the same meaning. The phrase "retail time transaction" is defined by § 408.250(15) as:

> [A] contract to sell or furnish or the sale of or furnishing of goods or services by a ***retail seller*** to a retail buyer for which payment is to be made in one or more deferred payments under and pursuant to a retail time contract or a ***retail charge agreement***.

"Retail charge agreement" is defined by § 408.250(12) as:

> [A]n agreement entered into in this state between a ***retail seller*** and a retail buyer prescribing the terms of retail time transactions to be made from time to time pursuant to such agreement, and which provides for a time charge to be computed on the buyer's total unpaid balance from time to time.

"Retail seller" is defined by § 408.250(13) as:

> [A] person ***who regularly grants credit to retail buyers*** for the purpose of purchasing goods or services from any person, pursuant to a retail charge agreement . . .

"Credit" is defined by § 408.250(2) as:

> [T]he right to incur debt and defer its payment ***pursuant to the use of a card, plate, coupon book or other credit***

> ***confirmation*** or identification device or number or other identifying description.

Accordingly, the original creditor from whom Plaintiff purchased the debt in question is a "retail seller" because it "regularly grants credit to retail buyers." The word "credit" includes "cards," such as the underlying debt for which Defendant is being sued. The credit that the original creditor allegedly extended to Defendant was a "retail charge agreement" between those parties. The moment Defendant allegedly defaulted on «FCST_Cl_Gender» retail time transaction with the original creditor, Sections 408.551 to 408.562 were immediately triggered and governed Plaintiff's right to collect the alleged debt. In other words, according to the overall statutory scheme, § 408.556 applied to Plaintiff's collection of Defendant's [unsecured] credit card debt.

Defendant's interpretation of the statute is further supported by the fact that § 408.554 (like § 408.556) refers to words like "collateral" and "voluntary surrender" in subsections which equally apply to secured and unsecured transactions alike. For example, § 408.554.1 states in pertinent part:

> After a borrower has been in default for ten days for failure to make a required payment and has not ***voluntarily surrendered possession of the collateral***, a lender may give the borrower and all cosigners on the credit transaction the notice described in this section."

Plaintiff would likely argue the above subsection applies only when the underlying transaction was "secured" AND the borrower still has possession of the collateral. Clearly, § 408.554.1 DOES apply to secured transactions where the borrower has not voluntarily surrendered possession of the collateral; however, it would be erroneous to presume the subsection ONLY applies in such instances as a result. First, the language of

the statute itself (just like the language of § 408.556.1) does not set forth any such restrictions. Second, § 408.554.4 states in pertinent part as follows:

> ***If a credit transaction is secured***, the notice described in this section shall further state the following . . .

In other words, by carving out an additional notice burden for "secured transactions," § 408.554.4 makes it ***blatantly clear*** that § 408.554.1 necessarily applies to both "secured" AND "unsecured" transactions. Thus, to the extent § 408.554.1 refers to "voluntarily surrendering possession of collateral," that language logically must be ignored if the transaction is unsecured. To find otherwise would be to render the language in § 408.554.4 ("if a credit transaction is secured . . .") totally meaningless.

Before the Court grants Plaintiff's motion to dismiss Count I of the counterclaim, the Court should first require Plaintiff to fully explain how it is possible that § 408.554.4 imposes a further obligation on secured creditors with respect to providing notice of default to consumers, if the notice required by § 408.554.1 only applies to secured transactions alone. Assuming Plaintiff agrees that § 408.554.1 applies to both "secured" and "unsecured" transactions, then Plaintiff must further explain why § 408.556.1 should be interpreted any differently.

Unquestionably, § 408.556.1 applies to both "secured" and "unsecured" credit transactions, just like § 408.554.1. Simply stated, Plaintiff's argument that § 408.556.1 only applies to secured transactions "seeking a deficiency or a disposition of collateral" cannot be substantiated by the plain language of the statute, or by the rules of statutory construction, which require any ambiguity to be resolved in favor of a liberal application of the statute. Count I of Defendant's counterclaim must survive as a result.

Plaintiff's Contention That The Petition Is Not A "Communication" Within The FDCPA Contradicts The Clear Weight Of Authority

In support of its contention that the Petition is not a "communication," Defendant relies on *Vega v. McKay*, 351 F.3d 1334 (11th Cir. 2003) and *McKnight v. Benitez*, 176 F. Supp. 2d 1301 (M.D. Fla. 2001). The FDCPA defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). In *Heintz v. Jenkins*, 514 U.S. 291 (U.S. 1995), the United States Supreme Court held:

> In ordinary English, a lawyer who regularly tries to obtain payment of consumer debts ***through legal proceedings*** is a lawyer who regularly "attempts" to "collect" those consumer debts. See, e. g., Black's Law Dictionary 263 (6th ed. 1990) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation ***or legal proceedings***"). *Id*. at 294. (Emphasis added).

In *Vega*, the issue concerned whether litigation proceedings could be considered "initial communications" within the FDCPA, such that attorneys were required to provide notice in the petition pursuant to 15 USC § 1692g that consumers had 30 days to request verification of the debt. The specific focus in *Vega* however was on the "*initial* communication" provision of the FDCPA; *Vega* never once addressed the question of whether a pleading itself constituted a "communication." Clearly the plain language of the FDCPA (i.e., "the conveying of information regarding a debt directly or indirectly to any person through any medium") coupled with the Supreme Court's holding in *Heintz* (i.e., "To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings") strongly support Defendant's argument that the petition is a "communication."

Moreover, in *Delawder v. Platinum Financial Services Corp*., 2005 U.S. Dist. LEXIS 40139 (S.D. Ohio 2005), the court expressly held that the initiation of litigation proceedings constituted "debt collection practices" and did not shield the defendant from suit. In so holding, the court cited various opinions which reached the same conclusion, to wit: *Hartman v. Asset Acceptance Corp*., 2004 U.S. LEXIS 24845 (S.D. Ohio 2004) ("The FDCPA, as noted above, is a broad remedial statute, regulating conduct far broader than that which might lead to liability for defamation or similar common law torts. Congress clearly intended to regulate the "process" of debt collection, and ***nothing in the statute exempts testimonial documents filed by a debt collector***"), and *Grearing v. Check* Brokerage Corp., 233 F.3d 469 (7th Cir. 2000) (the false allegation in a lawsuit that a debt collector was the "subrogee" of the original creditor was sufficient to state a claim under the FDCPA). See also, *Piper v. Portnoff Law Assocs*., 396 F.3d 227, 234 (3d Cir. 2005) ("We have already noted that, if a communication meets the Act's definition of an effort by a "debt collector" to collect a "debt" from a "consumer," it is not relevant that it came in the context of litigation"). In *Blevins v. Hudson & Keyse, Inc*., 395 F. Supp. 2d 662 (S.D. Ohio 2004), the court cited the following cases, all of which found the FDCPA applies to communications filed as part of a litigation: *Miller v. Wolpoff & Abramson*, 321 F.3d 292 (2nd Cir. 2003); *Tomas v. Bass & Moglowski, P.C*., 1999 U.S. Dist. LEXIS 21533 (W.D. Wisc. 1999); *Campos v. Brooksbank*, 120 F. Supp. 2d 1271 (D.C.N.M. 2000); and *Jacquez v. Diem Corp*., 2003 U.S. LEXIS 8333 (D.C. Ariz. 2003).

Finally, Defendant's arguments do not rest simply on the petition and affidavit as a "communication," but also plead that Plaintiff has used "unfair or unconscionable ***means***" or "false, deceptive and/or misleading **means**" to collect a debt by engaging in

one or more enumerated acts, not that the petition itself was a "false, deceptive or misleading" communication. Defendant's petition, accordingly, invokes Section 1692(e), a basis which plaintiffs do not attack.

Conclusion

For the foregoing reasons, the Court must deny Plaintiff's motions to dismiss.

Respectfully submitted,

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Joe Consumer